No. 14677

In the
United States Court of Appeals
For the Ninth Circuit

VANCE W. WILLIAMS, *Appellant,*

vs.

TIDE WATER ASSOCIATED OIL COMPANY, *Appellee.*

APPEAL FROM THE UNITED STATES DISTRICT COURT OF THE WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION

BRIEF OF APPELLANT

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BRIEF OF APPELLANT

STATEMENT OF JURISDICTION

The appellant, a merchant seaman, brought an action at law against the appellee in the United States District Court for the Western District of Washington, Northern Division, to recover damages for personal injuries sustained by him when he slipped and fell while engaged in the course of his employment on board a vessel owned and operated by the appellee. Appellant's complaint and appellee's answer have been superseded by a pretrial order, and only the pretrial order appears in the record on appeal (R. 3).

The case came regularly on for trial before a jury and before the Honorable George H. Boldt, a District Court Judge of the United States District Court for the Western District of Washington, Northern Division. The

jury returned a verdict for the defendant and a judgment on the verdict of the jury was duly entered (R. 9), and the court filed its decision denying the motion for a new trial (R. 12) upon which an order was duly entered (R. 17). Appellant has duly prosecuted his appeal to this court from the judgment.

JURISDICTION OF THE DISTRICT COURT

The jurisdiction of the District Court is granted by the provisions of Title 28, U.S.C.A., Sec. 1331, granting District Courts' original jurisdiction of civil actions where the matter in controversy exceeds the sum or value of $3,000.00, exclusive of interest and costs, and arises under the laws of the United States; by the provisions of Title 28, U.S.C.A., Sec. 1332, which vests jurisdiction in District Courts in cases of diversity of citizenship and where the matter in controversy exceeds the sum of $3,000.00, exclusive of interest and costs, and by Title 46, U.S.C.A., Sec. 688 (Jones Act) which vests jurisdiction in the District Court in cases thereunder.

JURISDICTION OF THE COURT OF APPEALS

The jurisdiction of this court is granted by the provisions of Title 28, U.S.C.A., Sec. 1291, which gives to the Court of Appeals jurisdiction of all appeals from final decisions of the District Courts of the United States.

STATEMENT OF THE CASE

This is a seaman's action, on the law side of the court, brought to recover damages for serious and permanently disabling injuries sustained by the plaintiff while in the service of the defendant as maintenance man in the crew of the Tanker TIDEWATER (R. 72). Plaintiff's injuries were sustained on January 12, 1953, while the vessel was alongside a dock at Portland, Oregon (R. 47, 73, 171). Plaintiff at that time, pursuant to orders, was working with other members of the crew carrying a heavy hose from the port side of said vessel to its starboard side (R. 48). The area over which the men were working was located near its No. 2 tank on the forward part of the vessel (R. 48). Plaintiff had performed no duties in that section of the vessel that day prior to receiving his orders to help move the hose (R. 75). While he had washed out the after tanks of the vessel on the forenoon of that day (R. 75) other members of the crew had washed out the forward tanks while the plaintiff was at lunch (R. 81, 82). At the time of the accident the weather was misty and the decks were wet (R. 50, 81). Plaintiff and two other members of the crew picked up the hose in question (R. 49). Plaintiff was the last man on the hose and was carrying the end of the hose with a heavy flange attached to it on his right shoulder (R. 49, 97, 173). The other men led the way and plaintiff was required to follow (R. 98). Because of the manner in which he was required to carry the hose behind the other men he could not watch the deck (R. 99, 150), and because of the type of hose, could not follow directly in the path of the men who preceded him when the direction of their travel was

changed (R. 153). As the men proceeded across the deck plaintiff's feet hit an oily spot and he slipped and fell face down striking his head on the deck and with the heavy end of the hose dropping and striking him on the back of his neck (R. 50, 99). There was an oil spill at the spot where the plaintiff fell (R. 50, 177).

The main deck of the Tanker TIDEWATER was painted with a black hull paint not intended for use on deck (R. 31, 36, 101). No sand or other abrasive material was added to the paint in any manner (R. 32, 101, 179, 183) although this has been denied by defendant's witnesses (R. 220, 241, 262). The paint used on the TIDEWATER was normally slippery and became more slippery when wet (R. 228, 237). In the operation of tanker vessels it is expected that oil spills will occur on the deck and that deck paint will become impregnated with oil (R. 226). Extra precautions should therefore be taken in the maintenance of decks of tanker vessels as compared to the decks of dry cargo vessels (R. 38, 226). The normal and usual manner is for a specially prepared non-skid paint with an asphalt base to be used on the decks of tanker vessels (R. 30). These specially prepared paints have ingredients to prevent slipping. In the event that commercial non-skid paints are not used, sand or other abrasive materials are usually either mixed with the paint or are added to the surface of a freshly painted deck in order to provide safety for crew members (R. 166). Complaints had been made to the officers of the vessel with regard to the slippery nature of the deck and requests had been made that sand be added to the paint at the time of application or that a non-skid type

of paint be used (R. 32, 39). These requests had been denied (R. 32).

Because of the prevalence of oil spills on the main decks of tanker vessels and the danger to personnel of the vessel because of said spills, there was a standing order on board the vessel in question that all spills be immediately cleaned up at the time that they occur and that great care should be taken in that regard (R. 34, 236, 237, 269). The two members of the crew testified that plaintiff fell because of an oil spill that had not been cleaned up (R. 50, 177). Plaintiff testified that he fell because of an oily spot on the deck (R. 99). The accident report prepared by the second officer following the accident states as follows: "Slipped when carrying the slop hose along oily deck.—Fell flat.—Forehead hitting the deck—hose hitting back of head—hose on right shoulder." (Plaintiff's Exhibit 1, R. 44). This report was prepared on the day of the accident and was inserted in the rough log book of the vessel as a permanent record.

Defendant attempted to impeach plaintiff's witnesses Smith and Hamilton, with regard to the oil spill, by the use of prior inconsistent written statements (R. 60, 196). Any inconsistencies were explained by these witnesses (R. 64, 199). With regard to the oil spill, the defendant had no evidence to the contrary. Defendant's Captain Daly testified that he had made no inspection of the deck (R. 227). Defendant's second officer testified that he had made a casual inspection some time before the accident (R. 269).

A pretrial order was prepared before trial (R. 3). In

formulating the issues the court required the plaintiff to elect whether he would proceed under allegations of negligence or allegations of unseaworthiness and would not permit the plaintiff to proceed under both allegations (R. 8). Plaintiff excepted to the court's ruling and elected to proceed under allegations of negligence (R. 8). The case was presented to the jury under the theory of negligence only. The case was tried before Judge George H. Boldt and a jury and resulted in a verdict for the defendant. Plaintiff's motion for a new trial was denied.

The trial judge instructed the jury that in determining damages the law of comparative negligence must be applied (R. 298). Under this instruction the failure of the jury to bring in any verdict for the plaintiff was assigned as a reason in support of plaintiff's motion for a new trial in the court below (R. 10). The basis for this claim of error was that the evidence conclusively established the presence of oil and that from the testimony of defendant's own witnesses, the existence of an oily deck could only result from the negligence of the defendant or its employees, and that under the doctrine of comparative negligence plaintiff was entitled to a verdict as a matter of law.

There is also another issue before this court. During the course of his instruction to the jury the trial judge charged with respect to the presence of oil on the deck that in order to find the defendant negligent the jury must find that the defendant or its employees knew of the presence of the oil and that the defendant would not be liable for a transitory danger of such a condition

in the absence of actual or constructive knowledge of the existence of the same (R. 296). Plaintiff excepted to this instruction (R. 307).

SPECIFICATION OF ERRORS RELIED UPON

1. The court erred in requiring the plaintiff to elect his remedy between negligence under the Jones Act and unseaworthiness under the general maritime law.

2. The verdict of the jury for the defendant cannot stand in a seaman's case where the jury has been instructed that the rule of comparative negligence must be applied, where the physical conditions which caused the plaintiff's accident are the result of defendant's negligence even though there is a charge of contributory negligence against the plaintiff.

3. Where the evidence established that a condition causing plaintiff's injuries could only be the result of negligence and the violation of a standing order on board the vessel requiring crew members to clean up any oil spill immediately after it occurs, prejudicial error occurred when the jury was instructed that the plaintiff must also prove that the defendant had notice of the oily condition with an opportunity to correct the same before the defendant would be held liable, as follows: (R. 296):

> "If you should find that the plaintiff was caused to fall by reason of an oily condition on the foredeck of the TIDEWATER, that fact would not of itself warrant you finding that the defendant was negligent. To find a defendant negligent in this particular, if you were to find that there was oil at the place where the plaintiff fell, you must find not

only that there was this oily condition which caused the plaintiff to fall, but also that the defendant or its employees knew or in the exercise of reasonable care ought to have known of the condition and had unreasonably failed to remove it because the defendant is not liable for a transitory danger of such character in the absence of actual or constructive knowledge of the existence of the condition."

ARGUMENT

I. In a Seaman's Action for Damages at Law Liability May Be Predicated on Both Negligence and Unseaworthiness. The Trial Court Erred in Requiring Plaintiff to Elect Between Negligence and Unseaworthiness.

This is a seaman's action to recover damages for personal injuries asserting rights under the maritime law brought on the law side of the court with trial by jury. Plaintiff attempted to allege both negligence and unseaworthiness. By pretrial order the trial court ruled that the plaintiff could not join in one action a cause of action based upon unseaworthiness and one based upon negligence. The proof at the time of trial sustained both. The plaintiff was required to elect his remedy and elected to proceed upon the issues of negligence alone (R. 8). The court's ruling was erroneous and resulted in prejudicial error. The result of such a ruling can be best demonstrated by the opinion of the Supreme Court of the United States in the case of *Seas Shipping Co. v. Sieracki,* 328 U.S. 85, 90 L.Ed. 1099, which very clearly describes the absolute liability of a vessel owner in cases where unseaworthiness is established. The questions of reasonable care, notice and other related

questions do not occur where unseaworthiness is established. We quote briefly from that opinion.

> (U.S. p. 94) "These and other considerations arising from the hazards which maritime service places upon men who perform it, rather than any consensual basis of responsibility, have been the paramount influences dictating the shipowner's liability for unseaworthiness as well as its absolute character. It is essentially a species of liability without fault, analogous to other well-known instances in our law. Derived from and shaped to meet the hazards which performing the service imposes, the liability is neither limited by conceptions of negligence nor contractual in character. *Mahnich v. Southern S.S. Co., supra; Atlantic Transport Co. v. Imbrovek,* 234 U.S. 52; *Carlisle Packing Co. v. Sandanger, supra.* It is a form of absolute duty owing to all within the range of its humanitarian policy."

Plaintiff's claim derives from two sources, the Jones Act, 46 U.S.C.A., Sec. 688, which gives the right of action for negligence, and the general maritime law which gives a right of action for unseaworthiness. *Branick v. Wheeling Steel Corp.* (C.C.A. 3) 152 F.(2d) 887, 889-890. This case was, therefore, an action under the maritime law as modified or supplemented by the Jones Act.

While the question of election has been involved in a substantial number of cases, only two appellate courts have had this issue directly before them and have passed upon it. They are the United States Circuit Courts of Appeal for the Second Circuit and the Third Circuit. Both have decided that to compel an "election" between negligence under the Jones Act and unseaworthiness

under the general maritime law constituted prejudicial error. *German v. Carnegie-Illinois Steel Corp.* (CCA3) 156 F.(2d) 977; *McCarthy v. American Eastern Corporation* (CCA3) 175 F.(2d) 724, *cert. den.,* 338 U.S. 868; *Balado v. Lykes Bros. S.S. Co.* (CCA2) 179 F.(2d) 943. In all other appellate cases where the question has been touched upon it has been referred to only by way of dicta. The first appellate opinion was in the case of *German v. Carnegie-Illinois Steel Corp, supra,* decided on August 19, 1946. In that case a seaman was injured when he slipped while oiling up the engines. He charged negligence on the ground that another seaman had carelessly dropped oil on the foot box on which he was standing, and unseaworthiness on the ground that the vessel owner failed to provide a guard rail. Upon defendant's motion, the trial judge required him to "elect" between negligence and unseaworthiness. Plaintiff elected to proceed on the theory of negligence, and as in the case at bar, the trial resulted in a jury verdict for the defendant. On appeal, the Circuit Court of Appeals for the Third Circuit set the verdict aside and remanded the case for a new trial, holding that the required "election" constituted prejudicial error. The court's conclusion that the error was prejudicial was peculiarly prophetic, for the second trial of the case resulted in a verdict for the plaintiff. *German v. Carnegie-Illinois Steel Corp.,* 75 F. Supp. 361. We proceed to a historical analysis of the foundation for the *German* decision.

Under the general maritime law, prior to the passage of the Jones Act, a seaman who suffered personal injuries in the service of his ship could hold the ship and

her owners liable for (a) maintenance and cure; (b) wages to the end of his contract; and (c) indemnity by way of compensatory damages if his injuries resulted from the unseaworthiness of the vessel or her appliances. *The Osceola,* 189 U.S. 158, 47 L.Ed. 760. He could not on the other hand recover damages for injuries suffered through the negligence of a fellow servant, for under the general maritime law the fellow servant doctrine was available to the vessel and her owners as a complete bar to recovery. *The Osceola, supra; The Arizona v. Anelich,* 298 U.S. 110, 120, 80 L.Ed. 1075, 1079. Although the traditional methods of enforcing these rights was by libel in admiralty, either *in personam* or *in rem,* the right of a common law remedy was "saved" under the Judiciary Act of 1789, (1 Stat. at L. 76, 77, Chap. 20). *Panama Ry. Co. v. Vasquez,* 271 U.S. 557, 70 L.Ed. 1085; *The Moses Taylor,* 4 Wall. 411, 18 L.Ed. 397. However, the choice of forum does not affect substantive rights and consequently, although the seaman may elect to proceed at law to enforce a right sanctioned by the maritime law and cognizable in admiralty, his rights are governed by substantive admiralty principles: *Garrett v. Moore-McCormack Co.,* 317 U.S. 239, 87 L.Ed. 239; *Chelentis v. Luckenbach S.S. Co.,* 247 U.S. 372, 62 L.Ed. 1171; *Seas Shipping Co. v. Sieracki, supra,* 328 U.S. 85, 90 L.Ed. 1099. In brief, prior to the passage of the Jones Act, the seaman's right to recover indemnity by way of compensatory damages was limited to a showing of unseaworthiness and this right was enforceable both in admiralty as well as at law.

The Jones Act brought new and additional rules of

liability into the maritime law. It created a right of action for damages through the negligence of the master or crew. *The Arizona v. Anelich, supra; Pacific S.S. Co. v. Peterson,* 278 U.S. 130, 73 L.Ed. 220; and accorded to seamen the right to prosecute the action in federal courts at law with trial by jury, irrespective of diversity of citizenship, *Van Camp Sea Food Co. v. Nordyke* (CCA 9) 140 F.(2d) 902; and at the same time conferring concurrent jurisdiction upon the courts of the several states, *Engel v. Davenport,* 271 U.S. 33, 70 L.Ed. 813; *Bainbridge v. Merchants and Miners Co.,* 287 U.S. 278, 77 L.Ed. 302.

The Jones Act, 46 U.S.C.A., Sec. 688, provides, in pertinent part, as follows, and brings us to the immediate question before this court:

> "Any seaman who shall suffer personal injury in the course of his employment may, *at his election,* maintain an action for damages at law with the right of trial by jury, and in such action all statutes of the United States modifying or extending the common law right or remedy in cases of personal injury to railway employees shall apply; * * * " (Italics supplied)

The defendant has asserted and has been sustained by the trial court that the phrase "at his election" requires the seaman to elect between theories of liability, that is to say, that it requires the seaman to choose whether he will assert liability on the theory of unseaworthiness under the old rules, or on the theory of negligence under the new rules and that it forecloses the assertion of liability upon both grounds in the same

action. This proposition on its face appears to be so unreasonable as to make it improbable.

What, then, is the election contemplated by the Jones Act? One aspect has already been considered, namely, the seaman's freedom of choice to proceed in admiralty, in rem, if desired, rather than at law. But there is a second aspect to the problem. While the Jones Act created and incorporated into the maritime law new rules of liability for injuries resulting from negligence, it did not create a new *cause of action* with respect to such injuries. In other words, recovery of damages based upon negligence was not intended to be cumulative to recovery in damages based upon unseaworthiness. Congress was simply providing an additional basis of liability upon which a single recovery of damages could be predicated; the operative facts, whether constituting unseaworthiness or negligence, or both combined, being common to both and *constituting but a single legal wrong resulting in a single cause of action.* This, in plain terms, means that a seaman is foreclosed from prosecuting from judgment on the merits, two actions based upon the same legal wrong, one on the theory of negligence and the other on the theory of unseaworthiness. If the seaman chooses to proceed to judgment on any single theory of liability he may not thereafter proceed again on another theory since his single cause of action once litigated on whatever theory is extinguished at the moment of judgment. The foregoing is consonant with the established principles of res judicata. *Baltimore S.S. Co. v. Phillips,* 274 U.S. 316, 71 L.Ed. 1069. An examination of the *Phillips* case served to demonstrate that, precisely for this reason, a

seaman cannot adequately enforce his rights under the maritime law unless he proceeds as the plaintiff here attempted to proceed. That is to say, unless he asserts *in the same action* all of the grounds upon which he expects a judgment in his favor. In that case the seaman had prosecuted to judgment (the judgment being adverse to the seaman) a libel in admiralty against a vessel owner for damages resulting from personal injuries allegedly caused "by negligence in failing to provide a safe place to work and to use reasonable care to avoid striking respondent, and by unseaworthiness and insufficiency of gear and tackle employed on the vessel" (at U.S. p. 318). Thereafter he brought a second action to recover damages for the same injury, based upon the negligent operation of the same appliances by the ship's crew. The Supreme Court held that the judgment on the merits of the first case operated as an absolute bar between the same parties since the second suit was upon the same cause of action as the first one. The court stated as follows:

> (U.S. p. 319) "The affect of a judgment or decree as res adjudicata depends upon whether the second action or suit is upon the same or a different cause of action. If upon the same cause of action, the judgment or decree on the merits in the first case is an absolute bar to the subsequent action or suit between the same parties or those in privity with them, not only in respect of every matter which was actually offered and received to sustain the demand, but also *as to every ground of recovery which might have been presented* * * * ."
>
> (U.S. p. 320) *"He is not at liberty to split up his demand and prosecute it by piecemeal, or present*

only a portion of the grounds upon which special relief is sought, and leave the rest to be presented in a second suit, if the first fail. There would be no end to litigation if such a practice were permissible)." (Italics supplied.)

The trial court in its memorandum decision (R. 14) has adopted the defendant's argument to the effect that the *Phillips* case does not deal with an election under the Jones Act, but is simply a typical case of res adjudicata where an action had been tried under a theory of negligence and lost, and a second action alleging additional grounds of negligence had been filed. Both the trial court and the defendant have overlooked the fact that the Supreme Court in the *Phillips* case passed directly on this point. The Supreme Court pointed out that the first *Phillips* case was tried under the rule of *The Osceola, supra,* that is, under the theory of unseaworthiness alone, and that the court and counsel had misinterpreted the effect of the Jones Act in that case. The *Phillips* case, therefore, is direct authority on the precise question before this court. We quote from the court's opinion as follows:

(U.S. p. 324) "It follows that here both the libel and the subsequent action were prosecuted under the maritime law, and every ground of recovery *open to respondent in the second case, was equally open to him in the first.* But evidently in the first proceeding both court and counsel misinterpreted the effect of Sec. 33, and proceeded upon the erroneous theory, that in admiralty the rule laid down in the *Osceola,* 189 U.S. 158, 175:

" 'That the seaman is not allowed to recover an indemnity for the negligence of the master, or any

> member of the crew, but is entitled to maintenance and cure, whether the injuries were received by negligence or accident,'
>
> was still in force. Otherwise, it is quite apparent from the language of the opinion that an amendment would have been sought and allowed, pleading the ground of negligence afterwards set up in the second action. *Nevertheless, the cause of action was one and indivisible,* and the erroneous conclusion to the contrary cannot have the effect of depriving the defendants in the second action of their right to rely upon the plea of res judicata. Plaintiff's claim for damages having been submitted and passed upon, the effect of the judgment in the admiralty case as a bar is the same whether resting upon an erroneous view of the law or not.'' (Italics supplied.)

It follows, therefore, that the second phase of the election contemplated by the Jones Act simply means that if the seaman proceeds to recover damages under the old rules on the ground that his injuries were occasioned by unseaworthiness he may not thereafter recover damages under the new rules on the ground that his injuries were caused by negligence. This does not mean that he cannot proceed on both grounds in the same action, for no matter whether the injuries were occasioned by unseaworthiness or by negligence, or both combined, there is but a single legal wrong for which he will recover one indemnity by way of compensatory damages. The crux of the matter is that plaintiff's right to assert both grounds of liability at law does not stem exclusively from the Jones Act. It derives primarily from the principles reviewed in the *Phillips* case, *supra,* considered in conjunction with the rules that

liability for unseaworthiness may be asserted on the law side of the court without encroachment upon the admiralty jurisdiction. Had Congress intended to foreclose this procedure it would not have been difficult to find suitable language to express such intent. The addition of the following italicized phrase, or its equivalant, would have been all that was necessary, namely, that "in such action all statutes of the United States modifying or extending the common law right or remedy in cases of personal injury to railway employees shall apply, *and if such action be at law, the said statutes shall apply to the exclusion of all laws or rules of liability.*" But Congress obviously had no such purpose in mind. At the time of the passage of the Jones Act it was the established doctrine that liability for unseaworthiness was enforceable on the law side of the court. Consistent with the principles reviewed in the *Phillips* case, *supra,* Congress in creating the new rules of liability for the benefit of seamen simply supplemented the existing maritime law by providing that in such action all of the prescribed railway acts shall apply. By this provision, the new rules were incorporated into and became an integral part of the maritime law, and by it, the seaman was left free to avail himself of the old rules of liability as well as the new, *provided both are asserted in the same action.*

It is abundantly evident from the foregoing that *German v. Carnegie-Illinois Steel Corp.,* 156 F.(2d) 977, is the consistent and logical culmination of firmly rooted principles of the maritime law. The proper rule is succinctly summarized in the *German* case at page 979:

"Obviously, there are two distinct issues to be tried. German was entitled to have the jury pass on both in accordance with established principles of negligence and general maritime law. If his proof can sustain either or both, he may recover damages * * * but, of course, only one compensation for the injuries he suffered. This he was denied by the action of the learned court below.

"We are unable to dismiss the error as being unprejudicial. * * * ."

Exactly the same question came before the Circuit Court of Appeals for the Third Circuit again in the case of *McCarthy v. American Eastern Corporation, supra,* 175 F.(2d) 724, certiorari denied, 338 U.S. 868, rehearing denied 338 U.S. 939. That court had before it the validity of a verdict in favor of the plaintiff on a claim which had as its basis both the unseaworthiness of the vessel and the negligence of the crew. The basis of the appeal was the alleged error in submitting both of these issues to the jury. The Third Circuit referred to the fact that although this question had been decided adversely to the appellant on one of its prior decisions (*German v. Carnegie-Illinois Steel Corp., supra*), in view of the insistent argument that its prior decision ran counter to decisions of the Supreme Court of the United States, the court reviewed its prior case and amplified the reasons which led to its conclusion. After discussing the rationale of the *Phillips* case, *supra*, the court then discusses its decision in the light of the traditional attitude of the courts toward the rights of seamen at page 726 as follows:

"Moreover, it seems clear to us that the rationale of the decision in *Baltimore S.S. Co. v. Phillips*

necessarily excludes the interpretation of the phrase 'at his election' for which the defendant contends. For the doctrine of res judicata, which the court applied in that case, is bottomed upon the proposition that a party should not be afforded a second chance to litigate a question as to which he has already had the opportunity of a day in court. If a seaman in asserting a cause of action derived both from the old rules of the maritime law and the new rules of the Jones Act must confine himself to only one of these grounds for recovery and forever lose the benefit of the other by the application of the doctrine of res judicata, that doctrine applies in a very much harsher form to those who have always been regarded as wards of the admiralty in special need of protection than it does to all other litigants. For not only would an injured seaman have to decide at his peril, and in advance of judicial determination, which of two possible bases of his case was better grounded in law and fact, but he would also have to stake his whole possibility of recovery upon that choice, being barred from ever at any time asserting the other ground. He would thus be denied the right to any day in court upon what may turn out to have been his only valid ground for relief. And in some cases the choice might well be the nice one, often baffling to the most experienced lawyer, as to whether the injury was due to the failure of the owner to furnish suitable appliances or the negligence of the crew in their use. We cannot believe that Congress when it passed the Jones Act as a measure for the relief of injured seamen intended that it should put them at their peril to any such choice as this."

The court then concludes its decision with the state-

ment that the election referred to in the Jones Act was an election of remedies between a suit in admiralty and a civil action with a right of trial by jury.

The Circuit Court of Appeals for the Second Circuit originally in the cases of *Skolar v. Lehigh Valley R. Co.,* 60 F.(2d) 893, and *McGhee v. U. S.,* 165 F.(2d) 287, gave support to the proposition that an election between the two remedies would be required. These two cases are the basis of some decisions in inferior tribunals requiring an election. It was also on the basis of these two decisions that the District Court for the Western District of Washington, Northern Division, originally ruled that an election between negligence and unseaworthiness must be made (R. 15) and which ruling was thereafter perpetuated under a tenuous interpretation of the doctrine of *stare decisis* (R. 15). The District Court in its opinion on plaintiff's motion for a new trial makes this amply clear and stated as follows: "It would be inappropriate for the present judge to reexamine the question in the absence of exceptional circumstances and the third ground of plaintiff's motion ought to be denied on that basis alone." What has been overlooked is that the *Skolar* and *McGhee* cases, the basis of the original decision in the District, have been overruled by the Circuit Court of Appeals for the Second Circuit.

In the case of *Balado v. Lykes Bros. S.S. Co.,* 179 F.(2d) 943, the Circuit Court for the Second Circuit reversed its prior holdings in the *Skolar* and *McGhee* cases, *supra.* The *Balado* case was tried upon the theories of negligence and unseaworthiness. In the charge to the jury, however, the trial court removed the issue

of unseaworthiness from the jury. The question again before the Circuit Court was whether these two issues could be presented in the same proceeding. The court refers to its prior decisions and reverses its prior ruling. We quote from page 945 as follows:

> "The question whether the plaintiff must elect whether to claim damages under the Jones Act for negligence, or under maritime law for unseaworthiness before submitting his claims to a jury may perhaps be raised on a new trial because of certain dicta in our decisions in *Skolar v. Lehigh Valley R. Co.,* 60 F.(2d) 893, 894, and *McGhee v. United States,* 165 F.(2d) 287. On this matter of election of remedies we find the analysis by Judge Maris in the opinion of the Supreme Court in *Baltimore S.S. Co. v. Phillips,* 274 U.S. 316, 47 S.Ct. 600, 71 L.Ed. 1069, most persuasive. In accordance with the view there expressed we think there will be no necessity for such an election in the future. In our opinion, election is required by the Jones Act only between a trial by jury and a suit in admiralty. Here that election was made when the plaintiff brought his action at law under the Jones Act. On the evidence before us we can discover no proof of negligence on the part of the defendant which caused any injury to the plaintiff. If the plaintiff can sustain any claim for damages it will be founded on proof that the ship was unseaworthy when she sailed, and not on negligence of the officers and crew."

Prior to the publication of the decision of the *Balado* case, *supra,* the District Court of California, Southern Division, in the case of *Reed v. The Arkansas,* 88 F.Supp. 993, held that an election would be required. After the decision of the *Balado* case it was recognized

that no direct authority remained in support of the *Reed* decision, *supra.* By the case of *Thomsen v. Dorene B.,* 91 F.Supp. 549, a case emanating from the same district as the *Reed* case and decided several months after the *Reed* case, this is clearly demonstrated. We quote from the opinion of the *Thomsen* case at page 550:

> "Respondents rely upon *Reed v. Arkansas* (S.D., Cal., 1950) 88 F.Supp. 993, and the cases cited therein, including *Pacific S.S. Co. v. Peterson,* 278 U.S. 130, 49 S.Ct. 75, 73 L.Ed. 220. Also cited therein is *Skolar v. Lehigh Valley R. Co.,* 2 Cir., 1932, 60 F.(2d) 893, and *McGhee v. United States,* 2 Cir., 1947, 165 F.(2d) 287.
>
> "We hold these cases not controlling.
>
> "In the *Pacific S.S. Co.* case (*supra*), the matter of election between a suit under the Jones Act and an action for unseaworthiness was not properly in issue before the court, and the language in that decision is dictum.
>
> "In addition, *German v. Carnegie-Illinois Steel Co.,* 3 Cir., 1946, 156 F.(2d) 977, and *McCarthy v. American Eastern Corp.,* 3 Cir., 1949, 175 F.(2d) 724, cert. den. 1949, 338 U.S. 868, 70 S.Ct. 144, 94 L.Ed. 532, are cases directly in point upon the question as to the election and hold that one is not required.
>
> "*Balado v. Lykes Bros.,* 2 Cir., 1950, 179 F.(2d) 943, was a case in which the decision on election was not necessary, but in that case the second circuit referring to its decisions in the *Skolar* and *McGhee* cases (*supra*) terms its language therein on the subject of election as dicta and indicates its dissatisfaction with its own language, and reaches a contrary conclusion."

The courts almost uniformly now hold that a seaman may include charges of unseaworthiness and negligence in one cause of action. One of the most recent cases to review the authorities on this question is the case of *Hill, Jr. v. Atlantic Navigation Co.* (D.C. Va.) 1954 A.M.C. 2150, 2151, as follows:

> "In their brief, the respondents question the libellant's procedure of pleading a cause of action premised on a general admiralty doctrine, such as unseaworthiness, along with a claim under the Jones Act, 46 U.S. Code, sec. 688. Election to seek relief under the Act, they argue, precludes assertion of liability on any other ground; they cite *Pacific S.S. Co. v. Peterson* (1928), 278 U.S. 130, 1928 A.M.C. 1932. If this was ever the law, surely it is no longer. *The Fletero v. Arias* (1953), (4 Cir.), 1953 A.M.C. 1390, 206 F(2d) 267; *Balado v. Lykes Bros. S.S. Co.* (1950), (2 Cir.), 1950 A.M.C. 609, 179 F.(2d) 943; *McCarthy v. American Eastern Corp.* (1949), (3 Cir.), 1953 A.M.C. 1865, 175 F.(2d) 724."

Departments of the Superior Court of the State of Washington until recently were divided on the question of "election." *Spangler v. Matson Navigation Co.,* 1950 A.M.C. 409; *Lewis v. Orion Shipping & Trading Co.,* 1953 A.M.C. 546. With the decision of the Supreme Court of the State of Washington in the case of *Delbert L. Williams v. Steamship Mutual Underwriters Assn., Ltd.,* 145 Wash. Dec. 191, 198, 1954 A.M.C. 2006, all doubt has now been removed and seamen are no longer required to elect a remedy. In the *Williams* case, *supra,* the problem before the court was the applicability of the three year statute of limitations under the Jones Act. In determining that the action was not barred by

the statute of limitations on the ground that a recovery under the pleadings could be based either under the Jones Act, or under the general maritime law, the court stated as follows at page 198:

> "Whether appellant's injury was due to the unseaworthiness of the vessel as defined by the long-established rules of maritime law, or to the negligence of officers or members of the crew under the new rules made available by the Jones Act, or both, there was but a single wrongful invasion of a single primary right and there are not two separate claims or causes of action. *Baltimore S.S. Co. v. Phillips,* 274, U.S. 316, 71 L.Ed. 1079, 47 S.Ct. 600 (1927); *Pate v. Standard Dredging Corp.,* 193 F.(2d) 498 (1952).
>
> "When a seaman has alleged an injury in consequence of a maritime tort in an action on either the admiralty or the law side of a United States district court or in a state court, the issue of unseaworthiness may be raised notwithstanding allegations of negligence and notwithstanding failure to allege unseaworthiness. *Sandanger v. Carlisle Packing Co.,* 112 Wash. 480, 192 Pac. 1005 (1920), affirmed, *Carlisle Packing Co. v. Sandanger,* 259 U.S. 255, 66 L.Ed. 927, 42 S.Ct. 475 (1922); *Plamals v. S.S. 'Pinar del Rio,'* 277 U.S. 151, 72 L.Ed. 827, 48 S.Ct. 457 (1928)."

It must be noted that in the *Williams* case, *supra,* the Supreme Court of the State of Washington arrived at the same result, that an election is not required, without reference to the *German, McCarthy* and *Balado* cases, *supra.*

Under the foregoing it is evident that where the operative facts constituting the seaman's cause of action

for damages tend to establish both negligence and unseaworthiness, the seaman is not merely privileged but bound by both bases of liability unless he wishes to run the risk of being deprived of relief altogether. It is seldom possible to predict in advance whether the proofs adduced at trial will sustain one or other basis of liability, and it is never possible to foretell which the jury will adopt and which it might reject. To impose upon the seaman the type of "election" contended for by the defendant, and ordered by the trial court, would be to force upon the seaman a rule which is supported neither in logic, in reason, or in policy, and which would seriously hamper the enforcement of a seaman's rights. The entire basis of the trial court's decision on this point is the elective provision in the Jones Act, but the election contemplated in the Jones Act has no relation to the type of election ordered by the trial court in the instant case. To read the Act in the manner contended for by the defendant would be not merely to construe narrowly a species of legislation remedial in character, intended for the benefit and protection of seamen who are peculiarly the wards of admiralty, but to do violence to legislation whose provisions are calculated to enlarge and not to narrow the rights afforded to seamen. Such remedial legislation is always to be liberally construed. *The Arizona v. Anelich, supra,* 298 U.S. 110 at 123; *Socony-Vacuum Oil Co. v. Smith,* 305 U.S. 424 at 431; *Chelentis v. Luckenbach S.S. Co., supra,* 247 U.S. 372, 380, 381; *Thurston v. U.S.* (CCA9) 179 F.(2d) 514, 517.

We respectfully submit that the trial court erred in requiring the plaintiff to elect between unseaworthiness and negligence.

II. In a Seaman's Case Where the Negligence of the Defendant Has Been Established, a Verdict by the Jury for the Defendant Cannot Stand Under the Rule of Comparative Negligence, Notwithstanding the Seaman's Contributory Negligence. Plaintiff Is Entitled to a New Trial As a Matter of Law.

The evidence at the time of trial not only preponderated to the effect that the place at which the plaintiff fell was covered with oil, but the only evidence in the case is that the plaintiff slipped on an oily spot on the deck. Not only is this fact shown by plaintiff's own testimony and the testimony of Thomas Smith (R. 50) and Robert Hamilton (R. 177), but the accident report prepared by the defendant and admitted into the evidence as plaintiff's exhibit No. 1 (R. 44) states as follows:

> "Question 11—Describe fully how injury occurred: Slipped when carrying slop hose along oily deck. Fell flat, forehead hitting the deck, hose hitting back of head, hose on right shoulder." (R. 44 and plaintiff's exhibit No. 1)

The accident report was prepared on board the vessel by Second Officer De Jong after he had talked to the plaintiff and all of the other witnesses to the accident (R. 265). The report was signed by Chief Officer Regan (R. 249, 269). It must be assumed that Chief Officer Regan also first determined the facts recited in the report before signing the same. Chief Officer Regan did not testify at the time of trial, nor was his deposition taken by the defendant (R. 227). The only two witnesses called by the defendant on the facts of the case were Captain Robert W. Daly, who testified that he had made no inspection whatsoever of the deck prior to the

accident (R. 227), and Second Officer De Jong, who made a round of the deck some time previous to the accident (R. 269) but made no inspection immediately following the accident (R. 266).

The evidence is conclusive, therefore, that there was oil on the deck. The evidence is also conclusive that the presence of oil on the deck would be the violation of a standing order on board the vessel and could only result from negligence of crew members (R. 235, 236, 246, 269). The evidence also conclusively shows that the plaintiff, Vance W. Williams, had performed no work in the area where the accident had occurred during the tank-cleaning operations (R. 75). The record then is undisputed that the deck was oily and that said oily condition was the result of negligence of employees other than the plaintiff.

The trial court properly instructed the jury that the law of comparative negligence applied and that contributory negligence could not entirely defeat plaintiff's claim if the defendant was in any degree negligent, and that in such an event, plaintiff's own negligence would only diminish the award (R. 298). In view of the conclusive evidence of defendant's negligence, the failure of the jury to return any verdict for the plaintiff can only mean that the jury did not properly weigh the evidence and did not follow the instructions of the court, and that plaintiff's motion for a new trial should have been granted as a matter of law.

In the case of *Becker v. Waterman S.S. Co.* (CCA2) 179 F.(2d) 713, a mate employed upon a steamship brought an action as a result of slipping on some oil

near the deep tanks of the vessel. Defendant contended there could be no recovery because of plaintiff's duty to correct the dangerous condition of which he had knowledge. The court in disposing of this defense discussed the application of the rule of negligence and permitted recovery for plaintiff notwithstanding his own contributory negligence. The court stated at page 715:

> "In the case at bar the jury was entitled to find, as it apparently did, that a contributing cause of the accident was the negligence of the assistant engineer in failing to pump the oil out of the rose boxes as he had said he would do. If the plaintiff was also negligent in failing to see the blob of oil on which he slipped, his own negligence may reduce the amount of his recovery but is not a bar to his action. *Socony-Vacuum Oil Co. v. Smith, supra,* 45 U.S. Code, sec. 53. Hence the court was right in denying the defendant's motions to dismiss and to direct a verdict."

In the case of *Thurston v. U.S.* (CCA9) 179 F.(2d) 514, this court applies the rule which is determinative of this question. In that case a decision of the United States District Court of Oregon was reversed where recovery was denied to a third assistant engineer for injury sustained as a result of falling into an open hatch in the engine room. The trial court held that although the evidence showed that the hatch had been negligently left open by someone other than the appellant, that the appellant was negligent in the performance of his duties in failing to inspect and discover the open hatch, and further held that appellant's own negligence was the sole and proximate cause of the injury and denied a recovery of divided damages. The action of the trial

court in the *Thurston* case, *supra,* is exactly the same as the action taken by the jury in the instant case and is error as a matter of law. We quote to that effect from the opinion of the *Thurston* case at page 516:

"Appellant was injured by falling into an open hatch in the engine room floor. The evidence is uncontradicted that some other member of the crew had negligently removed the hatch cover, leaving the hatch open. Appellant negligently failed in the performance of his duty to inspect the engine room, whereby he failed to discover the open hatch into which he fell. Although the negligence of someone else making the engine room floor unseaworthy continued until combined with negligent failure to inspect the floor, the district court held that appellant's negligence was the sole proximate cause of the injury and denied a recovery of divided damages.

"We do not agree. The Supreme Court in *Socony-Vacuum Oil Co. v. Smith,* 305 U.S. 424, 59 S.Ct. 262, 83 L.Ed. 265, decided to the contrary that in such cases of negligent failure to perform a duty owed the ship, the doctrine of comparative negligence applies. There the negligent performance of an oiler's duty by using a defective step, of which he knew the defect, combined with the negligent failure of the ship to repair the step, with knowledge of the defect, caused the oiler's fall and injury. It was contended that the doctrine of assumption of risk applied to such negligent performance of the oiler's duty and not the admiralty rule of comparative negligence. As the court stated, 305 U.S. pp. 424, 426, 425, 59 S.Ct. at page 263:

" 'The question is whether assumption of risk is a defense in a suit brought by a seaman under the

Jones Act to recover for injuries resulting from his use, *while on duty,* of a defective appliance of the ship, when he chose to use the unsafe appliance instead of a safe method of doing his work, which was known to him.'

" 'Respondent was employed, as an oiler in petitioner's engine room. It was his *duty* while the vessel was under way to touch with his finger, at intervals of twenty minutes, a bearing of the propeller shaft, in order to ascertain whether it was overheating and in need of additional lubrication. Directly in front of the bearing, as he approached it, was an iron step, located about one foot above the engine room floor and bolted to the bedplate which supported the bearing * * *'

" ' * * * The fall was caused by a defective step on which respondent stood while on duty, when seeking to learn, by touching with his finger, whether an engine bearing was overheated.

" 'In submitting the case to the jury the trial court applied the admiralty rule of comparative negligence, instructing the jury that negligence of respondent contributing to the accident was not a bar to recovery but was to be considered in mitigation of damages. The court refused petitioner's request for an instruction that if respondent *could have performed his duty* without use of the defective step, he assumed the risk of injury from it. Instead, the court charged that there was no assumption of risk by the seaman where the shipowner failed in its duty to furnish a safe appliance.' (Emphasis supplied)

"We are unable to see any difference between the oiler's negligence in failing in his duty to use the safe method of inspecting the shaft bearing's temperature and the failure of the appellant in his duty

to inspect the engine room. In both cases prior negligence to supply a safe place to work due to the negligence of someone other than the injured seaman continued until the injury which was caused by the combined negligence. Were the identity of the two cases not the same we would reach the same conclusion by applying the doctrine of liberal construction applicable to seamen's cases and stated in the *Socony-Vacuum* case, *supra,* 305 U.S. p. 431, 59 S.Ct. 262, 83 L.Ed. 265.

"With regard to appellant's contention that the award for maintenance and cure is insufficient, we think the award is sustained by the evidence.

"The decree is reversed and the cause remanded to the district court for a retrial of the issue of appellant's injuries pursuant to the principle above recognized."

We respectfully submit that plaintiff was entitled to some verdict as a matter of law under the evidence of the case and that the judgment should be reversed and that plaintiff should be granted a new trial on this ground alone.

III. Where the Presence of Oil on the Deck Could Only Result from Negligence As the Violation of a Standing Order, the Court's Instruction that the Plaintiff Must Also Prove that the Defendant Had Notice with an Opportunity to Correct the Oily Condition Was Prejudicial Error.

In actions under the Jones Act, the employer is liable for the acts of negligence of fellow servants. *International Stevedoring Co. v. Haverty,* 272 U.S. 50, 71 L.Ed. 157. It is sufficient to prove that an unsafe condition was the result of a negligent act of a fellow crewman

in order for the plaintiff to recover. Liability in cases where negligence of a fellow servant exists as a cause of the unsafe condition does not depend upon notice of the condition being brought to the attention of the employer. The evidence at the time of trial, both from plaintiff's witnesses and defendant's witnesses, was to the effect that the existence of any oil on the deck could only be the result of the negligence of the crew member who failed to remove the oil spell immediately after it occurred (R. 236).

The MV "TIDEWATER" was an oil tanker, and because of the nature of the cargo carried on board, oil spills were not uncommon. If oil spills were permitted to remain on deck they would constitute a constant hazard to the ship's crew (R. 237). Because of this danger, a standing order was always in effect that any oil on deck was required to be cleaned up immediately. The failure, therefore, of a crew member to observe a spill at the time it occurred and his failure to clean it up immediately constitutes negligence sufficient in and of itself upon which to base a recovery. Captain Robert W. Daly testified as follows in that regard (R. 235):

> "Q. All right. Now suppose in the process of disconnecting the slop hose or in taking his own hose out of the tank some oil or some spillage occurs on the deck, what is he supposed to do?
>
> A. Wipe it up.
>
> Q. Is he supposed to do it before he puts his stuff away or as part of the same process?
>
> A. Yes. (253)
>
> Q. On other words, his job as soon as it appears is to immediately take some steps to either neutral-

ize it by putting sand on it or wiping it up, that is true, isn't it?

A. Yes, sir.

Q. And if a man doesn't do that he is not doing his job?

A. No.

Q. That is correct, isn't it?

A. Yes.

Q. And whoever cleans it out has got to do that immediately and everybody expects him to do that?

A. Yes.

Q. The master expects him to do that, the officers and the other members of the crew who may be working somewhere else?

A. Yes.

Q. So there can be no question about it, it must be done immediately and he doesn't have to wait for an order from an officer to do it, does he?

A. No.

Q. As a matter of fact, if an officer would come by and see an oil spill someone would probably get the devil for not having wiped it up, wouldn't they?

A. They should, yes.

Q. In other words, the existence of an oil spill itself (254) on that ship shows somebody didn't wipe it, isn't that correct?

A. Yes."

Notwithstanding the foregoing, the court instructed the jury as follows (R. 296):

"If you should find: that the plaintiff was caused to fall by reason of an oil condition on the foredeck

of the TIDEWATER, that fact would not of itself warrant you finding that the defendant was negligent. To find a defendant negligent in this particular, if you were to find that there was oil at the place where the plaintiff fell, you must find not only that there was this oil condition which caused the plaintiff to fall, but also that the defendant or its employees knew or in the exercise of reasonable care ought to have known of the condition and had unreasonably failed to remove it because the defendant is not liable for a transitory danger of such character in the absence of actual or constructive knowledge of the existence of the condition."

By the foregoing instruction the court, contrary to the evidence, stated that the presence of oil on the deck in and of itself was not negligence and injected into the issues the question of notice to the defendant of an oily condition and indicated to the jury the oily condition of the deck may be of a transitory nature, the knowledge of which must be brought home to the defendant before liability would attach. This is contrary to the law under the evidence and constituted prejudicial error.

In the case of *Adams v. American President Lines, Ltd.,* decided by the Supreme Court of California, en banc, on February 10, 1944, 1944 A.M.C. 550, a case involving similar facts, was tried before a jury in San Francisco, California. In that case the jury returned a verdict in favor of the plaintiff after which the trial court granted defendant's motion for a new trial. The Supreme Court of the State of California reversed the lower court.

In that case the plaintiff, a seaman on the SS "PRESIDENT PIERCE," slipped on an orange peel on a stairway

sustaining a severe hand injury. There was no evidence as to how long the orange peel had been on the stairway and the only evidence was that in all probability it was dropped by a member of the crew in the area after mealtime. The appellate court handled the question of liability very clearly as follows:

> "The plaintiff met the requirements of proof on his part when he introduced evidence from which the jury properly could infer that the presence of the orange peel was due to an act of negligence within the scope of employment. He was not required to negative any defense by which the defendant might successfully rebut his *prima facie* case. Rather it was for the defendant to go forward with evidence tending to prove that the presence of the orange peel was due to the perpetration of some act of malicious mischief, or good-natured scuffling which would take the act outside the scope of the employment. (*Runkle v. Southern Pacific Milling Co.,* 184 Cal. 714, 721, 195 P. 398, 16 A.L.R. 275; *Kruse v. White Brothers,* 81 Cal. App. 86, 253 P. 178.) No such evidence was introduced, and in the absence thereof, the evidence may not be said to support a reasonable inference that the act was without the scope of the employment."

In the case of *Becker v. Waterman Steamship Corporation* (CCA2) 179 F.(2d) 713, *supra,* the plaintiff, a deck maintenance seaman, slipped and fell on a blob of oil, which he had not seen, in a deep tank of the vessel. There was no evidence as to how long the oil had been at the particular place where plaintiff fell. There was evidence that an assistant engineer, prior to the accident, had been instructed to clean some spilled oil out of the rose box in the same deep tank and that he had

failed to do so. Liability in that case was predicated upon the failure of the assistant engineer to do his job and the question of the transitory nature of the condition and of notice to the defendant of that particular oily spot was not considered by the court as a defense.

In the case of *Bachman v. U.S.A.*, 72 F.Supp. 298, the libelant slipped on some oily deck plates in the engine room of the vessel. The negligence consisted of the failure to keep the area mopped up. The court found for the libelant entirely upon the negligent failure to clean up the oil spill. We quote from the opinion of the court at page 300:

> "The only evidence in the case touching the matter of whether the ship was negligent or was unseaworthy seems to me to come from the libellant himself; at least, that is the only evidence of a convincing nature. The witness Ames spoke of the usual situation respecting due care and seaworthy condition at the place of the accident, rather than as to a personal knowledge of the exact condition of the place at the time of the alleged occurrence of the accident.
>
> "So that the court finds, from a preponderance of the evidence, that the iron plates at the time and place of the accident were in an unseaworthy and negligent condition by reason of the failure of the ship and shipowner to keep the oil slick wiped up with a proper and suitable instrument such as a dry mop, and that as a result of such unseaworthy and negligent condition, the libellant sustained the injuries and damages for which he seeks compensation in this action."

The instruction of the court was obviously prejudi-

cial error. We respectfully submit that the judgment on the verdict should be reversed on the basis of this instruction alone.

CONCLUSION

It is respectfully submitted that the trial court erred in requiring the plaintiff to elect his remedy between negligence under the Jones Act and unseaworthiness under the general maritime law, and that the ruling of the court prevented the plaintiff from having a fair trial; that prejudicial error also occurred as a matter of law under the facts of the case where the jury failed to return any verdict for the plaintiff; that the court's charge that the plaintiff must prove that the defendant had notice of the oily condition with the opportunity to correct the same was prejudicial error under the evidence of the case. The foregoing errors are of an extremely prejudicial nature and the judgment on the verdict should not stand. We submit that the judgment should be reversed and the cause returned to the district court for a new trial.

Respectfully submitted.

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